

IN THE SUPREME COURT OF OHIO

GARY L. NUNN : Case No. 07-2350
: :
Appellant : Court of Appeals
: Case No. CA 2006-08-098
- vs. - : Case No. CA 2006-08-099
: Case No. CA 2006-10-123
CHRISTOPHER CORNYN, *ET AL.* : :
: Trial Court
Appellees : Case No. 04CV62162

ON APPEAL FROM THE WARREN COUNTY COURT OF APPEALS
TWELFTH APPELLATE DISTRICT

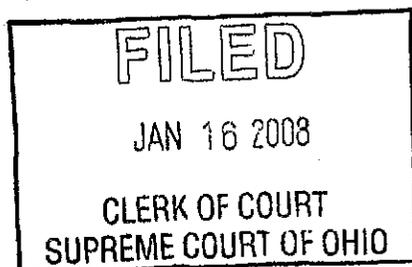
APPELLEE/CROSS-APPELLANT CHRISTOPHER CORNYN'S COMBINED
MEMORANDUM IN RESPONSE TO APPELLANT/CROSS-APPELLEE'S
MEMORANDUM IN SUPPORT OF JURISDICTION AND MEMORANDUM IN
SUPPORT OF JURISDICTION ON CROSS-APPEAL

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II. WHY APPELLANT/CROSS-APPELLEE'S CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court has long recognized that the Ohio constitution discourages successive appellate reviews of civil litigation and provides that the judgments of this state's courts of appeals:

... shall serve as the ultimate and final adjudication of all cases except those involving constitutional questions, conflict cases, felony cases, cases in which the Court of Appeals has original jurisdiction and cases of public or great general interest. Except in these special circumstances, it is abundantly clear that in this jurisdiction a party to litigation has the right to but one appellate review of his cause.¹

The *Williamson* Court limited the scope of its discretionary review of the acceptance of jurisdiction in non-constitutional civil cases to the "sole issue" of "whether the cause presents a question or questions of public or great general interest as distinguished from questions of interest primarily to the parties."²

Those principles are embodied in S.Ct.Prac.R. II. Section 1(A)(2) designates those cases claiming a substantial constitutional question as "claimed appeals of right" and provides this Court the discretion to decide whether to accept the appeal in accordance with the requirements of S.Ct.Prac.R. III. Similarly, Section 1(A)(3) of Rule II designates that appeals involving claimed questions of public or great general interest may invoke the discretionary jurisdiction of the Court, again in accordance with the provisions set out in Rule III.

¹ *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254, 168 N.E.2d 876; citation omitted.

² *Id.*, 171 Ohio St. at 254.

The latter rule requires that memoranda in support of claimed jurisdiction be filed and that such memoranda must contain a “thorough explanation of why a substantial constitutional question is involved . . . [or] why the case is of public or great general interest.”³

In his memorandum in support of jurisdiction, appellant/cross-appellee (sometimes “Nunn”) has provided only one paragraph to explain why he believes four issues meet either the substantial constitutional question or public/great general interest requirement. That is hardly the “thorough explanation” required by Rule III.

Moreover, Nunn’s brief exposition does not support his request for a merit review. To the contrary, all of the trial court and appellate court decisions challenged here were based on well-settled law and legal principles. They were not wrong decisions, did not violate any of his constitutional rights, and did not pervert or misconstrue existing law.

Nunn first wants this Court to deny every Ohio attorney the right to seek an equitable *quantum meruit* award for valuable legal services rendered to a client because he failed to comply with the unrelated ethical statutory requirement of a written contingent fee agreement.

Nunn’s statement of his issue misrepresents the facts already established in the record.⁴ Nunn is flat wrong in his claim that appellee/cross-appellant (sometimes “Cornyn”) **intentionally** . . . [violated] the statutory requirement” for a written fee contract.⁵

³ S.Ct.Prac.R. III, Sec. 1(b)(2).

⁴ Of course, there is no record at this juncture.

⁵ Nunn’s memorandum in support of jurisdiction, at 1. Emphasis added.

If there were a record, it would reflect Cornyn's clear deposition testimony that he thought he had a written fee contract with Nunn covering the underlying eviction case but that he apparently had not obtained a written agreement:⁶

Q. And in the case involving the eviction, which was Case No. 399 in the Warren County Court, and the case in the Common Pleas Court involving the eviction, which was 01CV57974, did you have a written fee contract with Mr. Nunn?

A. I thought I did, but apparently I didn't.

That is hardly an "intentional" violation and certainly no ground for denying Cornyn or any other Ohio lawyer the right to seek to achieve an implied contractual *quantum meruit* recovery for valuable legal services which were, in fact, performed with or without a written fee contract.

Nunn's second issue is also a fact-specific one which was fully and correctly addressed by the trial and appellate courts. It involves the denial of leave to file a third amended complaint. Indeed, the appellate court addressed the issue in detail in its November 5, 2007 Opinion.⁷

The judges assigned to this case below gave Nunn two extra opportunities — three chances if one includes his original complaint — to state his claims. It was Nunn's fourth attempt to change or add to his claims that was denied. As the courts below noted, Nunn's requests for leave to further amend were denied because substantial discovery had been conducted, and the alleged facts he believed would support the new claims were "known to

⁶ Chris Cornyn's deposition testimony is the only evidence there can be if a record is filed because Nunn failed to order Cornyn's trial testimony to support his appeal.

⁷ See Appendix, at §§ 10-16, pp. A-7 through A-10 below.

him well before he sought leave to file a third amended complaint.”⁸

The appellate court’s decision that the trial judge had not abused his discretion was an eminently correct one.

What Nunn would have this Court do is to establish a bright-line temporal rule which would absolutely require the granting of every effort to amend, no matter how many times or how long after commencement, if the plaintiff could point to some third-party’s unrelated delay in bringing the case to an ultimate conclusion.

Those decisions have been adequately handled for many years by trial judges’ sound exercise of discretion within the framework of Civ.R. 15 and an extensive body of case law interpreting that rule.

In Nunn’s hoped-for legal world, civil litigation would become an essentially endless and constantly changing pursuit so long as the attorney or party has enough imagination to dream up new and different claims to add or alter or subtract by way of successive amendments.

That sledgehammer approach would destroy judicial discretion and do far more damage to our already overburdened civil legal system than any rare minuscule benefit it might provide to a specific litigant.

The third and fourth issues Nunn has posited are especially trivial ones which deserve scant attention by this Court. One of them has to do with a single objection uttered by an attorney for a witness during the course of trial.

That witness was Barbara Horwitz, a former defendant and present appellee who had

⁸ *Id.*

been dismissed on motion. That dismissal was, of course, a non-final order subject to later appeal, and Nunn did pull her back into the litigation by appealing her dismissal.

The circumstances of the objection may have been somewhat unusual, but they were certainly not unprecedented and handled easily and quickly without either tainting the jury or prejudicing Nunn.

The trial judge⁹ dealt with the slight interruption quickly and without fuss or prejudice to either Nunn or Cornyn. He brought the attorney forward to the sidebar, briefly explored the objection outside the jury's hearing, and disposed of the issue. Nothing more was heard from that lawyer.

As with the other issues Nunn seeks to have this Court review, the Court fully explored the pertinent facts and correctly rejected Nunn's asserted error.¹⁰

The last issue was also fully explored and reviewed by the Court of Appeals. It is whether resident Warren County Common Pleas Judge Neal Bronson harmed Nunn by signing a temporary stay order to preserve the *status quo ante* pending a decision on Cornyn's motion to quash subpoenas. Nunn served them on non-party banks for some of Cornyn's confidential banking records when the visiting judge assigned to the case could not do so himself. Judge Winkler explained during a subsequent hearing that Judge Bronson signed the order as a "'favor' because he was not available to do so."¹¹

That order worked absolutely no change in position of the parties. To the contrary,

⁹ Hamilton County Appellate Judge Ralph Winkler. Assigned to the case as a visiting judge.

¹⁰ See Appendix, at §§ 28-29, p. A-14 below

¹¹ *Id.*, at §§ 26-27, pp. A-13 through A-14 below. The quoted language is in § 27.

it merely froze the parties in place until the duly assigned visiting judge had an opportunity to rule on the motion.

Any other decision would very likely have resulted in the disclosure of confidential and sensitive private financial information before the trial judge had an adequate opportunity to decide whether Nunn had the right to see the documents he had subpoenaed.

To do anything other than what was done would certainly have prejudiced Cornyn. The temporary stay protected Cornyn **and** Nunn until Judge Winkler could review the motion to quash, the supporting and opposing memoranda, and issue a reasoned decision.

In summary, Nunn has not presented any substantial constitutional or public/great general interest question and is not entitled to pursue a discretionary merit appeal in this Court.

III. EXPLANATION OF WHY THE CROSS-APPEAL PRESENTED BY CORNYN IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Cornyn has by way of cross-appeal challenged the trial judge's refusal to exercise his gatekeeper function to prevent unqualified inexperienced lawyers from rendering unreliable legal opinions critical of Cornyn's handling of Nunn's underlying case against his former landlord.

As opposed to the issues raised by Nunn, the Court of Appeals did not consider that issue and found it to be moot in light of its affirmance of the jury verdict and judgment in Cornyn's favor.¹²

None of those attorneys was qualified to give expert legal testimony about Cornyn's

¹² *Id.*, at § 30, pp. A-14 through A-15 below.

handling of Nunn's case against appellee Spring Village Apartments. Their opinions were based on their lack of proper preparation, their inexperience as civil trial lawyers, and their unfamiliarity with the civil justice system in Ohio generally and in Warren County in particular. Their opinions thus amounted to little more than legal "junk science" which could not create a genuine issue for trial and ought not to have been heard by the jury.

While such determinations are necessarily fact-specific, it is clear that the United States Supreme Court thought this matter to be of sufficient public or general interest to cause it to render multiple decisions (in 1993 and in 1999) on the evil of permitting unreliable expert testimony into evidence. In so doing, it greatly expanded the role of federal trial judges to act as a "gatekeeper" and not to allow such testimony to pass through that gate and get to a jury.

The 1993 decision dealt with scientific testimony.¹³ The Court expanded the rule to require heightened judicial scrutiny of the reliability of "technical or other specialized" expert testimony in 1999.¹⁴

To be admissible, experts have always been required to meet a minimum standard of competence. But, there has been a long-standing tendency in Ohio trial courts to permit questioned expert testimony (as to both qualifications of the witness and the reliability of the opinions) and to allow it to be challenged by cross-examination in front of the jury.

This Court has also recognized the heightened standard in respect of the reliability

¹³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 125 L. Ed.2d 469.

¹⁴ *Kumho Tire Company, Ltd. v. Carmichael* (1999), 526 U.S. 137, 141, 143 L.Ed.2d 238.

of scientific expert evidence in *Miller v. Bike Athletic Co.*,¹⁵ in *State v. Nemeth*,¹⁶ and in Evid.R. 702(C).

This Court has also attempted to make it clear that:

[t]he qualification and reliability requirements of Evid.R. 702 are distinct. Because even a qualified expert is capable of rendering scientifically unreliable testimony, it is imperative for a trial court, as gatekeeper, to examine the principles and methodology that underlie an expert's opinion.¹⁷

Judge Winkler chose to simply permit the lawyer-experts to testify even though each of them was both unqualified within the meaning of Evid.R. 702(B) and based their opinions on unreliable data or plain ignorance within the meaning of Evid.R. 702(C).

So far as we know, this Court has not yet spoken specifically on the need for qualified and reliable expert lawyer testimony and the trial court's mandatory role in manning the gates to keep unreliable legal expert testimony out of the courtroom.

Expert testimony is, of course, generally required in cases involving professional standards of performance in Ohio.¹⁸ Once qualified to testify at all, ll such experts' opinion testimony must be based on reliable specialized information rather than mere hearsay, "scuttlebutt," etc.¹⁹

If this Court sees fit to accept jurisdiction as to any issue set forth by Nunn, Cornyn

¹⁵ (1998), 80 Ohio St.3d 607, 687 N.E.2d 735.

¹⁶ (1998), 82 Ohio St.3d 202, 694 N.E.2d 1332.

¹⁷ *Valentine v. Conrad* (2006), 110 Ohio St.3d 42, 44, 2006-Ohio-3561, ¶17. Citations omitted.

¹⁸ *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St.3d 112, 113, 461 N.E.2d 1295; *Haas v. Bradley* (Lorain Co. 2005), 2005-Ohio-4256, ¶¶ 17-18; *Bloom v. Dieckmann* (Hamilton Co. 1983), 11 Ohio App.3d 202, 203-04, 464 N.E.2d 187.

¹⁹ See Evid.R. 702(C).

urges this Court to accept jurisdiction on the cross-appeal as well.

IV. STATEMENT OF THE CASE AND FACTS

A. STATEMENT OF THE CASE

That portion of Nunn's combined Statement of the Case and Facts contained in the first paragraph of Nunn's memorandum in support of jurisdiction is largely accurate, as far as it goes. Cornyn filed a Motion for Summary Judgment on May 12, 2006 which was denied by the Trial Court on June 7, 2006.

Cornyn filed a Motion *in Limine* on June 9, 2006 seeking to preclude Nunn's liability experts, Bradley Hoyt, Craig Newburger, and James Kolenich, from offering opinion testimony at trial. The Trial Court denied that motion on June 26, 2006. Nunn attempted to state civil rights claims in a third amended complaint. His first motion for leave to file a complaint containing such claims was denied, and that claim was not in the case.

Judge Ralph Winkler of Hamilton County was assigned to this case on October 6, 2005 upon the granting of Nunn's May 13, 2005 motion to recuse the former assigned visiting judge, Judge McCracken.

Nunn first sought leave to file a third amended complaint on January 10, 2005. There were numerous opposing, reply, and supplemental memoranda filed in respect of that motion throughout the balance of January 2005, and the motion was denied in January 2006. In so doing, the Trial Court said that he would be willing to listen to a possible amendment if "something unusual would happen in this case before we go to trial."

Judge Winkler entered a Case Management Order which specified that the case would be tried to a jury, beginning July 17, 2006.

Nunn subsequently filed a second motion for leave to file a different version of a

third amended complaint on March 17, 2006 which was denied on April 18, 2006.

B. STATEMENT OF FACTS

Cornyn filed a Motion for Summary Judgment and a subsequent Motion *in Limine* to address the inadequacies of Nunn's three lawyer-experts under current law and to invoke the judge's "gatekeeper" function to decide if those experts ought to be allowed to get to a jury. Their only qualifications were that they were practicing lawyers, and Nunn's case was wholly dependent on their opinions.

They were James Kolenich, Craig Newburger, and Bradley Hoyt. None of them was qualified to give expert testimony in this case. Their opinions were based upon their lack of proper preparation, their inexperience as civil trial lawyers, and their unfamiliarity with the civil justice system in Ohio generally and in Warren County in particular. Their opinions amounted to little more than legal "junk science" which could not create a genuine issue for trial.

Cornyn demonstrated in detail in both his Motion for Summary Judgment and Motion *in Limine* below exactly why those lawyer-experts were wholly unqualified to opine on Cornyn's handling of Nunn's underlying lawsuit.

When he formulated his opinions in this case, Mr. Kolenich had been admitted to practice less than three years. Mr. Newburger had been admitted less than five years. Although Mr. Hoyt had been admitted to practice since 1982, he was employed as a "Senior Project Manager" by Senco Products until 2000 and only began his private practice after leaving Senco.

Mr. Hoyt's only civil trial experience was sitting as "second chair" in one civil injury lawsuit filed against one of his former employers. Since 2000, Mr. Hoyt has been actively

engaged in both the practice of law and as a “business consultant.”

Mr. Kolenich admitted that he had “never been sole counsel for anything” involving civil injury litigation.

Mr. Newburger described his less than five years practice as “basically . . . criminal defense work with some domestic relations and civil protection order cases.” Newburger acted as a civil case co-counsel once, but he admitted that he has never “personally” tried a civil injury case.

As noted above a detailed recitation of their inadequacy as trial experts was fully detailed in Cornyn’s motions for summary judgment and *in limine*.

V. RESPONSE TO FIRST PROPOSITION OF LAW

WHERE AN ATTORNEY HAS INADVERTENTLY FAILED TO SECURE A WRITTEN CONTINGENT FEE OR OTHER WRITTEN CONTRACT FROM HIS CLIENT AND IS SUBSEQUENTLY DISCHARGED WITH OR WITHOUT JUST CAUSE, SUCH ATTORNEY IS ENTITLED TO RECOVER THE REASONABLE VALUE OF THE SERVICES RENDERED THE CLIENT PRIOR TO DISCHARGE ON THE BASIS OF QUANTUM MERUIT. FOX & ASSOC. CO., L.P.A. V. PURDON (1989), 44 OHIO ST.3D 69, 541 N.E.2D 448, AND REID, JOHNSON, DOWNES, ANDRACHIK & WEBSTER V. LANSBERRY (1994), 68 OHIO ST.3D 570, 629 N.E.2D 431, APPROVED AND FOLLOWED.

Nunn persists in incorrectly assuming that the mere filing of the counterclaim for fees and expenses in what was originally thought to be a contingent fee case is insupportable because there was no fee contract. He has also attempted to elevate that filing into some sort of an effort “to bully the Plaintiff into submission,”²⁰ on the strange theory that Cornyn “knew that he had no claim to the fees requested in the counterclaim.”²¹ That

²⁰ Nunn’s memorandum in support of jurisdiction, at 4.

²¹ *Id.*

notion is so obviously untrue under our well-established law that it ought to be rejected out of hand.

First, relevant prior decisions by this Court make it clear that Cornyn had the right to seek recovery for his hard work on Nunn's behalf.

It is also factually untrue. The jury conclusively found that Cornyn did **not** negligently represent Nunn and that Chris Cornyn provided extended valuable services to Nunn, not the least of which was completing extensive discovery and taking Nunn's case against his former landlord through two full-blown trials,²² each with a successful outcome for Nunn. It is thus clear that Cornyn was entitled to reasonable compensation for his substantial and valuable legal services to Nunn, and he received no recompense therefor. Rather, he was sued.

As noted above, Cornyn dismissed the counterclaim solely to try to get this case back on track.

There is no support for Nunn's primary proposition that the absence of a written contingent fee contract or Cornyn's initial expectation to be paid on a contingency basis prohibited the filing of his counterclaim. That point was made clear in this Court's syllabus in *Fox & Assoc. Co., L.P.A. v. Purdon*²³ that, with or without a written contract, a discharged "attorney is entitled to recover the reasonable value of the services rendered the client prior to discharge on the basis of *quantum meruit*."²⁴ Nunn not only "discharged" Cornyn within

²² One to the Magistrate and one to the Court.

²³ (1989) 44 Ohio St.3d 69, 541 N.E.2d 448.

²⁴ *Id.*, at Syllabus. "When an attorney is discharged by a client with or without just cause, and whether the contract between the attorney and the client is express or implied, the attorney is entitled to recover the reasonable value of the services rendered the client

the meaning of *Fox*, he sued him.

This Court has also held that an attorney working on a contingent fee basis has a *quantum meruit* claim for a fee recovery upon the successful occurrence of the contingency.²⁵ The awards of monetary damages to Nunn in the underlying case trials are the successful occurrence of the contingency in this case.

All of the legal authorities Nunn cited in his Brief are broad, general, and vague. None of them deals with this issue. Nunn may refuse to believe it, but the law implies a promise from the employer to pay the attorney for his services, as much as he may merit or deserve.

Neither court below erred to Nunn's prejudice in denying his motion for sanctions for the mere filing and later dismissal of the counterclaim. This asserted proposition does not meet this Court's standards for a merit review.

VI. RESPONSE TO SECOND PROPOSITION OF LAW

WHERE SUBSTANTIAL DISCOVERY HAS ALREADY BEEN UNDERTAKEN IN A CIVIL MATTER WHICH HAS BECOME OLD FOR WHATEVER REASON, THE TRIAL COURT DOES NOT ABUSE ITS DISCRETION IN DENYING A PLAINTIFF'S MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT WHERE: (1) SUCH FILING WOULD NECESSITATE REVISITING SOME OR ALL OF THAT PRIOR DISCOVERY; (2) IT STATED ADDITIONAL CLAIMS THAT ARE NOT LEGALLY COGNIZABLE IN THE CIRCUMSTANCES OF THE CASE; AND (3) WERE BASED ON ASSERTED FACTS WHICH THE PLAINTIFF KNEW MANY MONTHS BEFORE THE MOTION FOR LEAVE TO AMEND WAS FILED.

Nunn's only stated support for his motion below for leave to file a third amended

prior to discharge on the basis of quantum meruit."

²⁵ *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry* (1994), 68 Ohio St.3d 570, 629 N.E.2d 431. Second paragraph of the syllabus.

complaint was that there were new “facts and causes of action that must be alleged.”²⁶ The entire filing was only two paragraphs long and, despite the fact that Civ.R. 15(A) favors amendment in the interest of justice, neither the rule nor Ohio case law permits filing an amended complaint which cannot make out a *prima facie* case or the facts fail to support the new claims.²⁷

Nunn sought to add two counts to his third amended complaint which were not contained in his original, first amended, or second amended complaints. The first, denominated as Count Five, boiled down to an accusation of mail fraud which is scandalous on its face would have been subject to being stricken under Civ.R. 12(F).²⁸

That count was nothing more than a thinly veiled way of defending Cornyn’s then-pending counterclaim for fees by taking an offensive posture. It was certainly not an independent claim for relief. Cornyn later dismissed the counterclaim shortly following the January 6, 2006 hearing on the motion for leave to amend and other things because it was sidetracking the main claim of malpractice and the case was old and needed to be concluded. The counterclaim was thus dismissed merely to get the case back on track.²⁹

Beyond that, the only basis for claiming “mail fraud” in connection with the

²⁶ Nunn’s motion (in the record before the Court of Appeals as T.d. 74), at 1.

²⁷ *Wilmington Steel Products, Inc. v. Cleve. Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, 573 N.E.2d 622. Here, this Court reversed an appellate decision which held that leave should have been granted and reinstated the trial court’s initial decision that leave should not be granted.

²⁸ “Upon motion . . . or upon the court’s own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.”

²⁹ Nunn did obtain a transcript of that hearing. If a record is ever ordered to be filed in this Court, the relevant language appears at page 39.

counterclaim was the notion that the bills were mailed and that they contained errors. Nunn has consistently refused to recognize – or at least refused to admit – that the counterclaim was based on the equitable doctrine of *quantum meruit*. Consequently, errors in the bills which can be adequately demonstrated will reduce the level of recovery, if any. Such errors do not rise to the level of creating a viable cause of action for “mail fraud,” and the Trial Court was well within its discretion to deny the motion.

The second count Nunn sought to introduce by way of his third amended complaint was the civil rights claim under 42 U.S.C. § 1983 which would also have been futile.

Private conduct, no matter how discriminatory or wrongful, is not actionable under Section 1983.³⁰ Moreover, it is well established that private attorneys are not state actors when representing their clients in state court proceedings.³¹

It is possible that such a claim can be made out if a private attorney conspires with a judge to deprive plaintiff of a constitutional right.³² But, no such claim can exist against the wholly private defendants under the facts peculiar to this case because Nunn possessed absolutely no constitutional right to the continued occupancy of his apartment. He was a month-to-month tenant who had refused to pay his rent for more than one month and who failed to avail himself of his right pay the rent to the county court clerk’s office in escrow to avoid eviction pending a decision on whatever defenses he thought he had. Neither did he lose a constitutional right in respect of his personalty because the record would establish

³⁰ *American Mfgs. Mut. Ins. Co. v. Sullivan* (1999), 526 U.S. 40, 143 L. Ed.2d 130.

³¹ See, e.g., *Catz v. Chalker* (6th Cir. 1998), 142 F.3d 279, 289 (plaintiff’s wife’s attorneys were not state actors for purposes of Section 1983 claim), amended by 243 F.3d 234 (6th Cir. 2001).

³² *Kimes v. Stone* (9th Cir. 1996), 84 F.3d 1121.

that he actually abandoned it, and, equally important, Cornyn won a judgment for him in the underlying case for the loss of the property.

Most important of all, the Court of Appeals correctly noted that the alleged facts Nunn believed would support the new claims were “known to him well before he sought leave to file a third amended complaint.”³³

There was no abuse of discretion under the facts of this case, and nothing Nunn has presented even hints of being of sufficient import to justify the destruction of a trial judge’s discretion to permit or refuse to permit amendments under the guidance of Civ.R. 15 and established Ohio case law on the subject.

This asserted proposition also does not meet this Court’s standards for exercising its discretion to accept the case for a merit review.

VII. RESPONSE TO THIRD PROPOSITION OF LAW

A WITNESS AT THE TRIAL OF A CIVIL MATTER IN WHICH THAT WITNESS HAD PREVIOUSLY BEEN DISMISSED AS A PARTY ON A MOTION TO DISMISS (BUT SUBJECT TO BEING BROUGHT BACK INTO THE CASE UPON SUBSEQUENT APPEAL) IS ENTITLED TO LEGAL REPRESENTATION WHILE TESTIFYING UNDER SUBPOENA, AND A SINGLE OBJECTION MADE BY THAT WITNESS’ ATTORNEY WHICH WAS DISPOSED OF OUTSIDE THE JURY’S HEARING AT A SIDEBAR CONFERENCE CONSTITUTED NEITHER REVERSIBLE ERROR NOR PREJUDICE TO ANY OF THE PARTIES PARTICIPATING IN THE TRIAL.

That portion of the transcript of proceedings that Nunn did order reflects that the only “disruption” to the jury process was when appellee Barbara Horwitz’s attorney made an objection in open court. Once he identified himself and whom he represented, Cornyn’s counsel suggested that it should be handled at the sidebar. That’s what Judge Winkler did.

³³ See Appendix, at §§ 10-16, pp. A-7 through A-10 below

All further proceedings in respect of that minuscule interruption by Ms. Horwitz's counsel occurred outside the hearing of the jury.

There are many disruptions which occur during the course of a three day trial in an active courtroom. Perhaps the least of them is a single objection uttered by an attorney representing a witness in the trial. While a jury may well puzzle about the content of a sidebar conference, it is certainly not prejudicial error to Nunn to have the judge hear the objection outside the jury's hearing. It happens all the time, and Ms. Horwitz was entitled to representation because she was a defendant who had been dismissed in a non-final order which was subject to this later appeal.

Like the others, this asserted proposition also does not meet this Court's standards for exercising its discretion to accept the case for a merit review.

VIII. RESPONSE TO FOURTH PROPOSITION OF LAW

A TEMPORARY STAY ORDER BY RESIDENT JUDGE OF THE COURT OF COMMON PLEAS IN A CASE PENDING IN THAT COURT WHICH MERELY PROHIBITED A NONPARTY FROM PRODUCING DOCUMENTS PURSUANT TO SUBPOENA UNTIL THE VISITING JUDGE ASSIGNED TO THE CASE RULED ON THE OPPOSING PARTY'S MOTION TO QUASH DOES NOT PREJUDICE THE PARTY WHO ISSUED THE SUBPOENA OR DEPRIVE THAT PARTY OF A FAIR TRIAL OR LOSS OF A CONSTITUTIONAL OR OTHER VALUABLE AND PROTECTED RIGHT.

This is the most trivial of all of the issues Nunn has presented as being substantial enough to warrant a merit review in this Court.

Judge Winkler was assigned to this Warren County case. Nunn had subpoenas served on Community National Bank and Fifth Third Bank. Cornyn moved to quash those subpoenas only three days after they were issued. On that day, Warren County Judge Bronson signed an order for Judge Winkler which provided only that "the production of

documents [be] stayed until the Court can address the Motion to Quash filed April 14, 2006.”

That stay order was nothing more than a temporary order preserving the *status quo ante*.³⁴ Its function was merely to permit Judge Winkler time to deal with the motion to quash and make a reasoned decision after full briefing, etc.

That order was not – and was never intended to be – a final order or order disposing of any of Nunn’s rights. Indeed, Nunn was given an opportunity to make his arguments in opposition to the motion to quash, they were fully considered by Judge Winkler, and a substantive, dispositive decision granting the motion to quash was subsequently entered.

Therefore, the stay order about which Nunn has continued to complain in no way prohibited him “from obtaining records and evidence vital for his case.”³⁵ The challenged order did nothing more than permit the assigned judge time to make a reasoned decision upon the merits of Cornyn’s motion to quash.

The absence of a specific statement in the order that Judge Winkler was unavailable cannot help Nunn, either. He did cite a case³⁶ which noted that an administrative judge cannot sign a valid order confirming a sheriff’s sale of foreclosed real property without noting on the order why the assigned judge could not do so. The order in this case did not do anything other than permit the duly assigned judge to make a substantive ruling without harming the opponent’s rights to the privacy of his confidential banking information

³⁴ Literally, the “state of things as it was before.”

³⁵ Nunn’s memorandum in support of jurisdiction, at 1.

³⁶ *Ameritrust Co. N.A. v. Davey* (May 7, 1987), Cuyahoga App. No. 51562, 87-LW-1343 (8th), cited at page 9 of Nunn’s memorandum in support of jurisdiction.

guaranteed to him by the Gramm-Leach-Bliley Act of 1999.³⁷

Therefore, Judge Bronson's temporary stay order was a valid one, and Nunn is not entitled to a merit review of the propriety of Judge Bronson's temporary stay order.

IX. CROSS-APPEAL

PROPOSITION OF LAW

IN A LEGAL MALPRACTICE CASE AGAINST A PLAINTIFF'S FORMER ATTORNEY, WHERE THE PLAINTIFF'S LAWYER-EXPERTS CLEARLY AND INCONTROVERTIBLY LACKED THE EXPERIENCE TO QUALIFY THEM TO GIVE OPINION TESTIMONY WITHIN THE MEANING OF EVID.R. 702(B) AND THEIR OPINIONS WERE UNRELIABLE WITHIN THE MEANING OF EVID.R. 702(C), THE EXPERTS SHOULD NOT HAVE BEEN PERMITTED TO TESTIFY, THE MALPRACTICE CASE SHOULD NOT HAVE SURVIVED SUMMARY JUDGMENT, AND THE CASE SHOULD NOT HAVE BEEN PERMITTED TO GO TO THE JURY.

Expert testimony is generally required in Ohio in cases involving professional standards of performance.³⁸ All such experts' opinion testimony must be based upon reliable specialized information rather than mere hearsay, "scuttlebutt," etc.³⁹

The U.S. Supreme Court greatly expanded the Trial Court's "gatekeeper" role in guarding against the admissibility of unreliable scientific testimony in 1993.⁴⁰ Six years later, the Supreme Court expanded that role to encompass all expert testimony.⁴¹ In so

³⁷ See 15 U.S.C., Subchapter I, Sec. 6801-6809, dealing with the disclosure of nonpublic personal information.

³⁸ *McInnis v. Hyatt Legal Clinics* (1984), 10 Ohio St.3d 112, 113, 461 N.E.2d 1295; *Haas v. Bradley* (Lorain Co. 2005), 2005-Ohio-4256, ¶¶ 17-18; *Bloom v. Dieckmann* (Hamilton Co. 1983), 11 Ohio App.3d 202, 203-04, 464 N.E.2d 187.

³⁹ See Evid.R. 702(C).

⁴⁰ *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 125 L. Ed.2d 469.

⁴¹ *Kumho Tire Company, Ltd. v. Carmichael* (1999), 526 U.S. 137, 143 L.Ed.2d 238.

doing, Mr. Justice Breyer stated for the majority:

In *Daubert* . . . this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence “assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” . . . The Court also discussed certain more specific factors, such as testing, peer review, error rates, and “acceptability” in the relevant scientific community. . . . This case requires us to decide how *Daubert* applies to the testimony of engineers and other experts who are not scientists. **We conclude that *Daubert*’s general holding - setting forth the trial judge’s general “gatekeeping” obligation - applies not only to testimony based on “scientific” knowledge, but also to testimony based on “technical” and “other specialized” knowledge.**⁴²

This Court adopted *Daubert*’s principles in *Miller v. Bike Athletic Co.*⁴³ and in *State v. Nemeth*.⁴⁴

What was at stake below was a good lawyer’s reputation and protecting juries in legal malpractice actions from being subjected to the legal equivalent of “junk science.” Under modern principles, trial courts have a gatekeeping function to insure that experts testifying in legal malpractice cases are qualified in the area relevant to the actual case – not merely lawyers – and that their testimony is not merely “subjective belief or unsupported speculation.”⁴⁵

Trial courts should endeavor to insure that expert testimony by lawyer-experts has

⁴² *Kumho, supra*, 526 U.S. at 141. Citations omitted. Emphasis added.

⁴³ (1998), 80 Ohio St.3d 607, 687 N.E.2d 735.

⁴⁴ (1998), 82 Ohio St.3d 202, 694 N.E.2d 1332.

⁴⁵ See 4 Jack B. Weinstein & Margaret A. Berger, *Weinsten’s Federal Evidence* (Jos. M. McLaughlin Gen. Ed., 2d Ed. 2002), §702.05 [1] [a].

a reliable basis and those experts' knowledge and experience in the relevant areas of discipline, so that the testimony of such experts actually does assist the jury in assessing matters which are beyond its lay knowledge and experience.⁴⁶

In fact, the requirement for expert testimony in legal malpractice cases even extends to such seemingly simple matters as the alleged failure to appeal.⁴⁷

Cornyn demonstrated in great detail in both his motions for summary judgment and *in limine* below that none of Nunn's lawyer-experts was qualified to give opinions regarding Chris Cornyn's handling of Nunn's underlying case. Because the principal basis of their incompetence arose out of their lack of experience in the handling of civil litigation, nothing they could have said at trial three months later could alter the clear fact that summary judgment should have been granted.

X. CONCLUSION

Nunn spent three years litigating his retaliatory eviction, bodily injury, and property damage claims in the underlying case. He has by now spent very nearly four more years litigating claims against his former lawyer for alleged malpractice, even though that lawyer successfully earned him a recovery before both the Common Pleas magistrate and trial judge. The handling of his underlying case by Chris Cornyn and Nunn's failure to prove that Cornyn committed malpractice were approved by a Warren County jury and affirmed

⁴⁶ Evid. R. 702(A); *Kumho, supra*, 526 U.S. at 149.

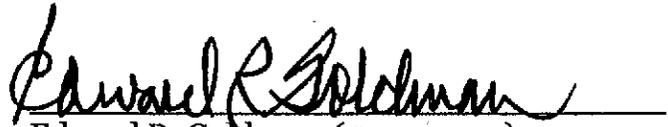
⁴⁷ *Bradley & Giardini Co. LPA v. Frambach* (June 26, 1996), Lorain App. No. 95CA006220, at *4. "Even if the trial court had determined that the condition of *Frambach's* probation were unconstitutional, it does not follow *a fortiori* that Bradley's failure to raise that issue on direct appeal constituted a breach of duty or malpractice as a matter of law. Nor is the failure to appeal those conditions an obvious breach of duty that is within the ordinary knowledge of laymen. Expert testimony was required."

by the Warren County Court of Appeals.

This case has run its course, Nunn has received more than a full measure of justice, and it's time for it to end.

As to the cross-appeal, Cornyn demonstrated prior to trial that none of the lawyer-experts retained by Nunn had sufficient experience or competence to offer opinions against Cornyn in his handling of the underlying case and that their opinions were unreliable as a matter of law. If any part of Nunn's case survives this process and receives a merit appeal, this Court is respectfully urged to exercise its discretion to grant a merit review of the cross-appeal.

Respectfully submitted,

A handwritten signature in black ink, reading "Edward R. Goldman", written over a horizontal line.

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XI. CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served upon the following, all by regular United States Mail, prepaid, on this 15th day of January, 2008.


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APPENDIX

NOV - 5 2007

IN THE COURT OF APPEALS OF OHIO
TWELFTH APPELLATE DISTRICT
WARREN COUNTY

James L. Spaeth, Clerk
LEBANON OHIO

GARY L. NUNN

Appellant

v.

CHRISTOPHER CORNYN

Appellee/Cross-Appellant

— and —

BARBARA L. HORWITZ, et al.

Appellees

Appellate Case Nos. 2006-08-098
2006-10-123
2006-08-099

Trial Court Case No. 04CV62162

JUDGMENT ENTRY

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E.R.G. *ERG*

The assignments of error properly before this court having been ruled upon as heretofore set forth, it is the order of this court that the judgment or final entry herein appealed from be, and the same hereby is affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be paid as stated in App.R. 24.

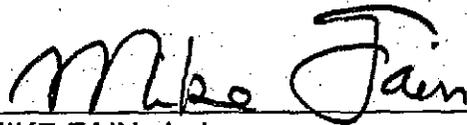
James A Brogan

JAMES A. BROGAN, Judge

William H Wolff, Jr.

WILLIAM H. WOLFF, JR., Judge





MIKE FAIN, Judge

(Brogan, J., Wolff, J., and Fain, J., of the Second District Court of Appeals, sitting by assignment of the Chief Justice of Ohio, pursuant to Section 5(A)(3), Article IV, of the Ohio Constitution.)

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IN THE COURT OF APPEALS OF OHIO
TWELFTH APPELLATE DISTRICT
WARREN COUNTY

COURT OF APPEALS
WARREN COUNTY
FILED

NOV - 5 2007

James D. Spaeth, Clerk
LEBANON OHIO

GARY L. NUNN,

Plaintiff-Appellant,

vs.

CHRISTOPHER CORNYN,

Appellee/Cross-Appellant,

- and -

BARBARA L. HORWITZ, et al.

Appellees.

CASE NOS. CA2006-08-098
CA2006-10-123
CA2006-08-099

OPINION

11/5/07

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 04 CV 62162

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Attorney for Appellee/Cross-Appellant, Christopher J. Cornyn

.....



BROGAN, J.

{¶1} This matter comes before the court upon three consolidated appeals. First, plaintiff-appellant, Gary L. Nunn, appeals from the trial court's entry of final judgment in favor of appellees, Christopher Cornyn, Barbara Horwitz, and the Spring Village Apartments, following a jury trial on his complaint alleging legal malpractice and other causes of action. Second, Nunn appeals from the trial court's decision and entry overruling his motion for attorney fees in connection with a dismissed counterclaim filed by Cornyn. Third, Cornyn cross-appeals from the trial court's decision and entry overruling his motion for summary judgment on Nunn's legal malpractice claim.

{¶2} The present appeals stem from an eviction action Spring Village brought against Nunn, a tenant in one of its apartments, several years ago in Warren County Court. While representing Nunn in the eviction action, Cornyn filed a counterclaim and had the case transferred to Warren County Common Pleas Court. Horwitz represented Spring Village in defense of the counterclaim.

{¶3} Nunn ultimately vacated the apartment and the matter proceeded to trial on Spring Village's claims for back rent and late charges and on Nunn's counterclaim for trespass, emotional distress, invasion of privacy, retaliatory eviction and breach of a landlord's duties. The case was heard by a magistrate, who awarded Nunn damages on his counterclaim totaling \$8,025. The magistrate reduced this award by \$1,800 to account for unpaid rent and late charges that Nunn owed Spring Village. The net result was a judgment in Nunn's favor for \$6,225 plus interest and costs. After Nunn filed objections to the ruling, the trial court conducted its own evidentiary hearing, agreed with the magistrate's decision, and entered judgment accordingly. Nunn did not appeal.

{¶4} Instead, Nunn commenced the present action in February 2004, alleging that

Cornyn had committed legal malpractice in his handling of the eviction proceeding. Nunn later filed first and second amended complaints, adding Horwitz and Spring Village as defendants and alleging, among other things, that they were liable for an unlawful entry into his apartment and the removal and destruction of his personal property after he vacated the premises. Cornyn also filed a counterclaim for attorney fees and expenses that Nunn allegedly owed him.

{¶15} The trial court subsequently denied Nunn leave to file a third amended complaint to add claims against Cornyn for billing fraud and against Cornyn, Horwitz, and Spring Village under 42 U.S.C. 1983. It also sustained a Civ.R. 12(B)(6) motion filed by Horwitz, sustained a summary judgment motion filed by Spring Village, and overruled a summary judgment motion filed by Cornyn. After Cornyn voluntarily dismissed his counterclaim for attorney fees, the matter proceeded to a four-day jury trial on Nunn's legal malpractice claim. The jury returned a verdict in Cornyn's favor. The trial court later overruled Nunn's motion for attorney fees and expenses incurred in connection with Cornyn's voluntarily dismissed counterclaim. These timely appeals followed.

{¶16} Nunn advances nine assignments of error in his two appeals. In his first assignment of error, he contends the trial court erred in entering summary judgment in favor of appellees Horwitz and Spring Village Apartments.¹ Aside from reciting the standards governing summary judgment, Nunn's appellate brief devotes one short paragraph to the merits of his argument. Therein, he simply asserts that Horwitz and Spring Village, allegedly acting without a valid court order, took possession of and destroyed personal property left in his apartment.

1. As noted above, the trial court actually sustained a Civ.R. 12(B)(6) motion filed by Horwitz and entered summary judgment in favor of Spring Village.

{117} Upon review, we conclude that Nunn has not demonstrated any error in the trial court's dismissal of the claims against Horwitz or the entry of summary judgment in favor of Spring Village. In sustaining a Civ.R. 12(B)(6) motion filed by Horwitz, the trial court found, among other things, that Horwitz was immune from liability to Nunn because she was acting in her capacity as counsel to Spring Village. In support, the trial court cited *Scholler v. Scholler* (1984), 10 Ohio St.3d 98, which states that "[a]n attorney is immune from liability to third persons arising from his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously." *Id.* at paragraph one of the syllabus. Nunn's first assignment of error fails even to address the trial court's conclusion that Horwitz was immune from liability. Therefore, he necessarily has failed to demonstrate error in the trial court's dismissal of the claims against her.

{118} With regard to Spring Village, Nunn cites his own affidavit to establish genuine issues of material fact as to liability for the removal and destruction of his personal property. In its December 22, 2005 summary judgment ruling, however, the trial court sustained Spring Village's motion to strike most of Nunn's affidavit, including the portions on which he relies. Nunn has not challenged that ruling on appeal. As a result, his affidavit does not establish a genuine issue of material fact for trial. Moreover, Nunn has completely failed to address the merits of the trial court's summary judgment ruling. The trial court noted that Spring Village sought summary judgment on claims against it for intimidation, trespass, invasion of privacy, conversion, and perjury. The trial court then found that intimidation was not a recognized cause of action in Ohio. It also found that Nunn's conversion claim was barred by collateral estoppel and that he could not obtain damages for the destruction of his personal property at the hands of Spring Village employees because he had recovered such damages in the prior

eviction action. With regard to trespass and invasion of privacy, the trial court found that Nunn had no cognizable claims because he voluntarily had vacated the apartment a year before the alleged trespass and had abandoned his personal property, which remained in the apartment during that time and which he conceded was worthless. The evidence presented during the eviction proceeding fully supported these conclusions. Finally, the trial court noted that Nunn's perjury claim stemmed from testimony given by Spring Village employees in the eviction action. The trial court observed that the judge hearing the eviction case had found some of the testimony not credible and, accordingly, had ruled in favor of Nunn. Therefore, the trial court found no damages flowing from the alleged perjury.

{¶9} On appeal, Nunn addresses none of the foregoing findings by the trial court. The *only* substantive argument in his first assignment of error is an assertion that "the Appellees took possession of and destroyed all of appellant's property without a valid court order." This conclusory argument does not address any of the grounds for summary judgment relied on by the trial court. Therefore, Nunn has failed to demonstrate any error in the trial court's summary judgment ruling. The first assignment of error is overruled.

{¶10} In his second assignment of error, Nunn asserts that the trial court erred in overruling his motion for leave to file a third amended complaint. As noted above, the proposed third amended complaint sought to add two claims. The first appears to have been a claim against Cornyn for fraudulent billing in the eviction action.² The second was a claim against Cornyn, Horwitz, and Spring Village, alleging liability under 42 U.S.C. 1983.

{¶11} In support of his motion for leave to file the third amended complaint, Nunn asserted that he had "completed extensive discovery in [the] case giving rise to additional

2. The precise nature of this claim is difficult to discern. It includes allegations that are not focused on one particular cause of action. For example, it includes assertions of extortion, mail fraud, breach of fiduciary duty, legal malpractice, retaliation, bad faith, and perjury. Based on our reading of the claim, however, it primarily appears to seek damages for fraudulent billing.

facts and causes of action that must be alleged." The trial court provided the following explanation for overruling the motion:

{¶12} "In this instance, Plaintiff proposes to file a fourth iteration of his Complaint. The case had been pending nearly a year at the time Plaintiff sought leave to file his third amended complaint, and at the present time, the case has been pending nearly two years. It appears that extensive discovery has taken place based upon claims brought in Plaintiff's second amended complaint. The further delay of proceedings that will necessarily follow the addition of new claims at this point is unjustified in light of the fact this would be Plaintiff's fourth complaint. The motion is denied."

{¶13} On appeal, Nunn points out the liberal amendment policy under Civ.R. 15 and stresses that delay itself generally is insufficient to justify denying leave to amend. Having reviewed the record and the trial court's ruling, however, we find no abuse of discretion in the denial of leave to file a third amended complaint.

{¶14} In his January 10, 2005 motion for leave to amend, Nunn asserted that "extensive discovery" had uncovered additional facts warranting the filing of yet another complaint. This discovery included the taking of Cornyn's deposition on November 29, 2004. But the fraudulent billing allegations in the third amended complaint were known to Nunn much earlier than his January 2005 motion or the taking of Cornyn's deposition in November 2004. Indeed, in a May 12, 2004 response to Cornyn's counterclaim for attorney fees and costs, Nunn alleged, as a defense, that Cornyn had "fabricated a claim of entitlement to a fee." Nunn also asserted that "the actions of Defendant Cornyn in claiming the fee he claims in his Counterclaim rise to the level of fraud in that Defendant Cornyn knows that he is not entitled to the amount claimed by any contract terms and has intentionally and wrongfully attempted to extract that amount from Plaintiff without legal basis." Additionally, Nunn

contended that Cornyn had "intentionally misrepresented the work he performed" and had "come forward to claim a fee an effort to intimidate Plaintiff into dismissing his original lawsuit * * *." Finally, Nunn alleged that Cornyn was "attempting to collect money from Plaintiff under illegal pretense and through fraudulent misrepresentation of the facts." Notably, Nunn made these allegations just one month after filing his second amended complaint in April 2004.

{¶15} Likewise, the allegations found in Nunn's 42 U.S.C. 1983 claim were known to him long before he sought leave to file a third amended complaint. The essence of the claim was that Cornyn, Horwitz, and Spring Village had deprived Nunn of his due process and property rights by removing and destroying his personal property after he vacated his apartment. We note, however, that the removal and destruction of Nunn's personal property occurred during the eviction proceeding and long before he commenced the present action. Moreover, in an earlier version of his complaint, Nunn alleged that Cornyn, Horwitz, and Spring Village were responsible for the unlawful entry into his apartment and the removal and destruction of his property. Therefore, the facts supporting Nunn's claim under 42 U.S.C. 1983 were known to him well before he sought leave to file a third amended complaint.

{¶16} In short, Nunn plainly knew of Cornyn's alleged fraudulent billing around the time he filed his second amended complaint in April 2004. At that time, he also knew of the factual allegations needed to support a claim under 42 U.S.C. 1983. Nunn did not seek to file a third amended complaint, however, until January 2005. By then, Cornyn already had been deposed for six hours and, as the trial court and Nunn agreed, extensive discovery had taken place. In light of these facts, we cannot say the trial court abused its discretion in denying Nunn's motion for leave to file a fourth version of his complaint. Although delay alone generally will not justify denying leave to amend, Nunn previously had amended his original complaint two times. Moreover, denial of the motion was justified based on the fact

that substantial discovery already had occurred, the fact that Nunn could have asserted his claims earlier, and the fact that allowing the amendment likely would have necessitated additional discovery and motion practice, thereby resulting in actual prejudice to the defendants. *Schweizer v. Riverside Methodist Hosp.* (1996), 108 Ohio App.3d 539, 546. The second assignment of error is overruled.

{¶17} In his third assignment of error, Nunn argues that the trial court erred in overruling his post-trial motion for attorney fees and expenses under R.C. 2323.51 and Civ.R. 11. This assignment of error concerns Nunn's attempt to recover attorney fees and expenses incurred in defending against Cornyn's counterclaim, which ultimately was voluntarily dismissed. Nunn argues that sanctions were appropriate under either the statute or the rule because Cornyn's counterclaim was frivolous and was filed merely for purposes of harassment.

{¶18} Upon review, we find no error in the trial court's refusal to award Nunn attorney fees and expenses under R.C. 2323.51 or Civ.R. 11. The record reflects that Cornyn initially filed a counterclaim against Nunn to recover attorney fees owed to him for his representation of Nunn in the underlying eviction action. Although Nunn asserted that no valid fee contract existed, Cornyn sought compensation on the basis of quantum meruit. Cornyn cited *Fox & Assoc. Co., L.P.A. v. Purdon* (1989), 44 Ohio St.3d 69, for the proposition that "[w]hen an attorney is discharged by a client with or without just cause, and whether the contract between the attorney and client is express or implied, the attorney is entitled to recover the reasonable value of services rendered the client prior to discharge on the basis of *quantum meruit*." *Id.* at syllabus. In light of the fact that Cornyn obtained a largely successful outcome for Nunn in the eviction action and also prevailed against Nunn in the malpractice action, Cornyn asserts on appeal that he plainly provided a valuable service for Nunn and that, at a

minimum, he was entitled to compensation on the basis of quantum meruit. Although Cornyn dismissed his counterclaim prior to trial, he informed the trial court below that he did so not because the counterclaim was meritless but because he wanted to facilitate bringing the litigation to a close. Based on our review of the record, we believe the trial court reasonably could have concluded that the counterclaim was not frivolous and that no sanctions were warranted under R.C. 2323.51 or Civ.R. 11. Nunn's third assignment of error is overruled.

{¶19} In his fourth assignment of error, Nunn claims the trial court erred in showing bias and prejudice against him. In support, he cites an incident when the trial court addressed the jury after it returned its verdict and stated: "[F]or what it's worth to you the court believes you rendered a substantial justice in this case." Assuming, arguendo, that it were improper for the trial court to make this remark, Nunn does not even attempt to explain how it prejudiced him given that it occurred *after* the jury returned its verdict.

{¶20} Nunn also cites other unspecified "belligerent" conduct by the trial court and "problematic behavior" including "interruptions and criticisms of Plaintiff's witnesses[.]" Unfortunately, he has failed to address these alleged instances of bias and prejudice with any specificity or to indicate where in the record they are found. We note too that Nunn has provided us with very little of his trial transcript, making it impossible to determine whether any real bias and prejudice existed and, if so, whether it deprived him of a fair trial. Accordingly, we overrule the fourth assignment of error.

{¶21} In his fifth assignment of error, Nunn maintains that the jury's verdict on his legal malpractice claim is against the manifest weight of the evidence. He argues that the evidence clearly supported a finding of legal malpractice and resulting damages. We note, however, that Nunn cites no specific evidence to support this claim. He simply recites the legal standards for a manifest-weight challenge and asserts that the jury's verdict is against

the weight of the evidence.

{¶22} In any event, Nunn has failed to provide us with a sufficient record to conduct a manifest-weight review. "[W]hen an appellant claims that the trial court's judgment was against the weight of the evidence or unsupported by the evidence, appellant must include in the record all portions of the proceedings during which such evidence may have been presented." *Bunnell Electric, Inc. v. Ameriwash*, Warren App. No. CA2004-01-009, 2005-Ohio-2502, ¶8. The transcripts Nunn has provided contain almost none of the testimony from his four-day jury trial. Without the ability to review the testimony presented at Nunn's trial, we must presume the validity of the jury's verdict. *Id.* at ¶9. The fifth assignment of error is overruled.

{¶23} In his sixth assignment of error, Nunn contends the trial court erred in awarding Cornyn \$713.10 on a counterclaim that had been dismissed. This argument stems from a post-trial motion Nunn filed seeking the release of certain funds held on deposit by the clerk of court. The money had been paid on behalf of Spring Village to satisfy the judgment in favor of Nunn plus interest and costs in the underlying eviction action. In response to Nunn's motion, Cornyn asserted that he was entitled to \$713.10 of the funds, as he "had paid for depositions which were recoverable as costs in the underlying action because they had been filed and became part of the evidence at the bench trials in [the eviction] case." The record contains an affidavit from Cornyn supporting his claim. Nunn responded that Cornyn's prior voluntary dismissal of his counterclaim for attorney fees and costs precluded recovery of the money. The trial court nevertheless found that Cornyn was owed \$713.10 and awarded that portion of the funds to him with the remainder being released to Nunn.

{¶24} Upon review, we find no error in the trial court's decision to award Cornyn \$713.10 as reimbursement for deposition expenses he had incurred. Nunn's only argument

on appeal is that Cornyn forfeited any right to the money when he dismissed his counterclaim for unpaid attorney fees and expenses. We disagree. Although Cornyn dismissed his formal counterclaim, he also plainly requested, in response to Nunn's motion for release of the funds, that he be awarded his out-of-pocket expenses of \$713.10. Nowhere in his sixth assignment of error does Nunn argue that Cornyn was not owed the money, and we find no error in the trial court awarding it to him. The sixth assignment of error is overruled.

{¶25} In his seventh assignment of error, Nunn asserts that the trial court erred in failing to assure the availability of a full trial transcript. In support, Nunn has provided us with an affidavit in which he avers that he actually requested, but could not obtain, "a full and complete copy of *parts* of the transcript." (Emphasis added.) Correspondence attached to the affidavit reveals that what Nunn failed to obtain from the court reporter were portions of the trial transcript containing jokes the judge allegedly told during trial. Even if the jokes were told, however, Nunn's inability to obtain a transcript excerpt containing them does not constitute grounds for reversal, particularly where he failed to utilize App.R. 9(C), which provides a remedy when a transcript is unavailable. The seventh assignment of error is overruled.

{¶26} In his eighth assignment of error, Nunn argues that the trial court erred in permitting a judge who was not assigned to the case to file an order staying the production of documents. This argument involves subpoenas Nunn filed to obtain Cornyn's bank records. Cornyn moved to quash the subpoenas three days later. That same day, Judge Neal Bronson filed an entry staying the production of documents pending resolution of the motion to quash the subpoenas. The judge assigned to the case, however, was Judge Ralph Winkler.

{¶27} Approximately three weeks after the stay, Judge Winkler filed a decision and

entry dissolving the stay and sustaining Cornyn's motion to quash. Judge Winkler subsequently explained during a September 27, 2006 hearing that Judge Bronson had signed the stay entry for him as a "favor" because he was not available to do so. Even assuming, arguendo, that Judge Bronson should not have granted a temporary stay, we see no prejudice to Nunn, and certainly no reversible error, given that Judge Winkler subsequently dissolved the stay and quashed the subpoenas. The eighth assignment of error is overruled.

{¶128} In his ninth assignment of error, Nunn claims the trial court erred in permitting an attorney not of record to disrupt his trial and in failing to declare a mistrial. This assignment of error concerns remarks made by Horwitz's attorney, Derrick Screnton, during her cross-examination. Screnton, who was not counsel of record in the case, interrupted the cross examination by saying, "Excuse me, your honor." He then identified himself as Horwitz's attorney. The trial court immediately proceeded to a side bar during which Screnton objected to the relevance of the questions Horwitz was being asked. The trial court did not directly rule on the objection but did express doubt about the relevance of the line of inquiry. The sidebar then ended and cross examination resumed. The following day, Nunn's attorney unsuccessfully moved for a mistrial.

{¶129} Upon review, we find no merit in Nunn's argument that the disruption by Screnton resulted in sufficient prejudice to require a mistrial. Screnton simply said, "Excuse me, your honor," and identified himself in open court. Although those actions resulted in a short side bar, we see nothing particularly prejudicial about the incident. The trial court did not abuse its discretion in denying the motion for a mistrial. The ninth assignment of error is overruled.

{¶130} In his sole assignment of error on cross-appeal, Cornyn contends the trial court

erred in overruling his motion for summary judgment on Nunn's legal malpractice claim. In support, Cornyn argues that Nunn lacked sufficient expert testimony to allow the malpractice claim to go to trial. We note, however, that the jury returned a complete defense verdict, and we have found no reversible error with respect to the trial court's entry of final judgment in Cornyn's favor. Therefore, regardless of whether the trial court should have entered summary judgment in Cornyn's favor prior to trial, we overrule his assignment of error as moot.

{¶31} Having overruled all assignments of error, we hereby affirm the judgment of the Warren County Common Pleas Court.

WOLFF, J., and FAIN, J., concur.

(Brogan, J., Wolff, J., and Fain, J., of the Second District Court of Appeals, sitting by assignment of the Chief Justice of Ohio, pursuant to Section 5[A][3], Article IV, of the Ohio Constitution.)